No. 5.

In the Supreme Court of the United States

OCTOBER TERM, 1923

UNITED STATES OF AMERICA, *Petitioner*,

v.

CALIFORNIA COOPERATIVE CANNERIES.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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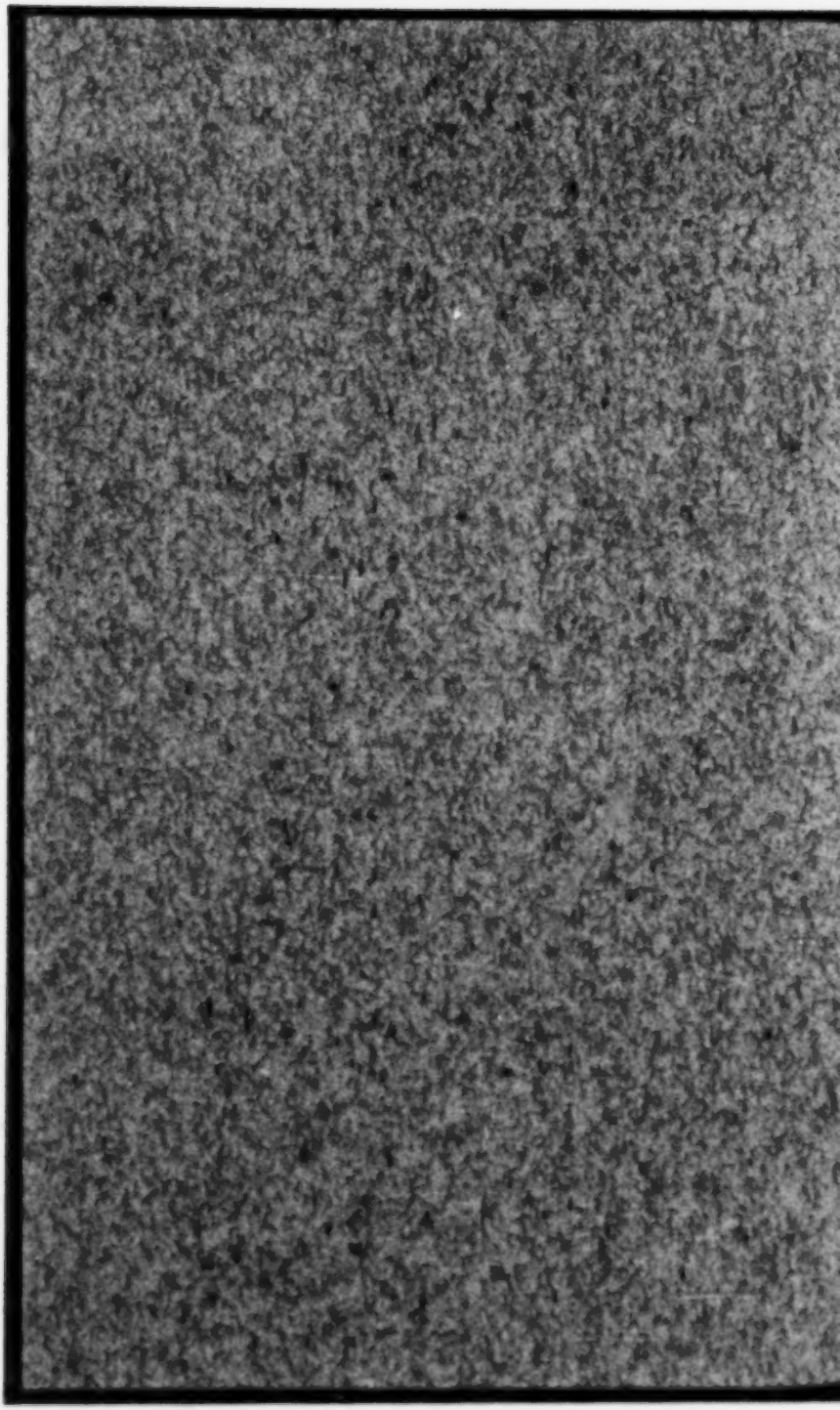

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UNITED STATES OF AMERICA, *Petitioner*

v.

CALIFORNIA COOPERATIVE CANNERIES.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

February 27, 1920, the Supreme Court of the District of Columbia entered the Packers' consent decree in the case of *United States v. Swift, et al.*

In 1921 the California Cooperative Canneries sought to have the Government, through the Department of Justice, with the Packers' consent, and with the approval of the Supreme Court of the District of Columbia, which had expressly reserved jurdisdiction in the decree, enter a modification order which would avoid the destruction of the business of the California Cooperative Canneries and permit

the Packers lawfully to engage in a lawful business.

In September and November, 1921, two Wholesale Grocers' Associations obtained leave to intervene in the cause for the express purpose of opposing the modification sought by the California Cooperative Canneries.

Thereupon, in 1922, the California Cooperative Canneries petitioned for leave to intervene, which was denied by order of the Supreme Court of the District of Columbia of May 8, 1923.

The California Cooperative Canneries prosecuted an appeal from that order to the Court of Appeals of the District of Columbia. On that appeal the Canneries and the Government and the Grocers' Associations were heard on briefs and oral arguments. No question as to the jurisdiction of the Court of Appeals was made by either the Government or by the Grocers' Associations. June 2, 1924, the Court of Appeals reversed the Supreme Court of the District of Columbia and ordered that the California Cooperative Canneries be allowed to intervene, and that such further proceedings thereupon be had as are necessary to determine the issues raised by the Canneries' petition (*California Cooperative Canneries v. United States*, 55 App. D. C. 36, 40; 299 Fed. Rep. 908, 914). No appeal from that decision of the Court of Appeals was taken to this Court or sought.

September 13, 1924, the Supreme Court of the District of Columbia entered an order granting the petition of the Canneries for leave to intervene, and directing that such further proceedings shall be had

as are necessary to determine the issues raised by the said petition. When that order was entered, no appeal was pending in the suit in any court. From that order, the Government took no appeal.

The Government, after some preliminary motions, filed its answer to the Canneries' petition, on the merits, early in 1925.

May 1, 1925, the Supreme Court of the District of Columbia entered an order, on motion of the Canneries, suspending the operation of the consent decree until a hearing be had upon the issues raised by the Canneries' petition and the Government's answer thereto. The Government insisted that the suspension should operate upon the consent decree as a whole, and the order of May 1, 1925, was so made because of the disposition of the Government.

Thereupon the Government prosecuted an appeal from the suspending order, not to this Court, but to the Court of Appeals of the District of Columbia. That appeal was, in due time, dismissed because of the failure of the Government to comply with the provisions of the rules of the Court of Appeals. The Government sought no action in this Court to review either (a) the suspending order of May 1, 1925, entered in the Supreme Court of the District of Columbia, or (b) the action of the Court of Appeals in dismissing the Government's appeal from that suspending order.

Thus stood the case between the Canneries and the Government until after the decision of this Court in *Swift & Company v. United States* of March 19, 1928, whereupon the Government, for the first time,

filed a motion in the Court of Appeals asking that Court to vacate its decision and judgment of June 2, 1924, and its mandate thereon of June 20, 1924. The Court of Appeals denied this motion on May 18, 1928, nearly four years after the decision sought to be vacated.

On the ground that "expedition" in such matters is vitally important, the Government now seeks to have this Court review a decision rendered June 2, 1924, in a case in which it raised no question of jurisdiction.

The Canneries' petition (record 185) alleges—and we expect to prove—that the Government's suit against the Packers was instigated and aided by the Grocers (and they so assert—record 132) in order to protect their industry from competition with the Packers and the Canneries, and that the effect of the consent decree was to complete a monopoly already partially possessed by the Grocers—even if it destroyed an alleged monopoly of the Packers. Neither the Courts nor the Congress could constitutionally do this (see *United States v. Terminal Railroad Association*, 236 U. S. *loc. cit.* 205-206; *Jelke v. Emery* (Wisconsin), 214 N. W. 369, also reported and annotated in 53 A. L. R. 463, 474; *California Cooperative Canneries v. United States*, 55 App. D. C. *loc. cit.* 40, also reported in 289 Fed. Rep. *loc. cit.* 914).

In its brief (page 11) the Government says that—"Substantial relief to the Government depends upon the granting of this petition and the reversal of the Court of Appeals' judgment of May 19, 1928." As

the issues have been made up in the trial Court on the merits between the Government and the Canneries, the Grocers and the Canneries, and the Packers and the Canneries, and the case stands ready for trial at any time the Government chooses to proceed, we think that the relief sought by the Government does not depend upon the granting of its petition for certiorari and the reversal of the judgment of the Court of Appeals of May 18, 1928, but can be promptly secured, if entitled thereto, by the hearing on the merits already provided for in the Supreme Court of the District of Columbia. The Government has never taken any steps to expedite the hearing on the petition of the Canneries, but, so far, has devoted most of its efforts to preventing such a hearing.

The petition of the United States for the writ of certiorari to vacate the decision, decree, and mandate of the Court of Appeals of the District of Columbia, is based upon an erroneous postulate. Because this Court has decided that the order of the Supreme Court of the District of Columbia of May 1, 1925, overruling the motion of the Swift and Armour groups of defendants to vacate the final decree of February 27, 1920, disposing of the case in that Court, was within Section 2 of the Expediting Act, the Government concludes that the natural consequence is that the order of the Supreme Court of the District of Columbia of May 8, 1923, denying leave to the Canneries to intervene for the protection of its special interests in the subject-matter of the suit, is also within Section 2 of the Expediting Act. This conclusion is a *non sequitur*. The motions of the

Packers to vacate the final decree were in effect appeals from that decree, and therefore came within the Expediting Act. The petition of the Canneries for leave to intervene was merely a request to be let into the cause for the purpose of securing an opportunity to be heard in support of its rights under its contract with Armour & Company. The denial of its petition prevented the Canneries from becoming a party to, or actor in, the suit, and left it without any standing to question the final decree in the slightest respect. The order denying leave to intervene did not affect the final decree either as to its merits or otherwise. It was from *this order* that the Canneries, prosecuted the appeal, the decision in which is now sought to be vacated.

After the mandate of the Court of Appeals went down, the lower Court, by order of September 13, 1924, vacated its order of May 8, 1923, granted the petition of the Canneries for leave to intervene, and directed that "such further proceedings shall be added herein as are necessary to determine the issue raised by the said petition." When the order of September 13, 1924, was entered, no appeal was pending in the suit in any court.

Thereafter, the Government, Packers, and Grocers, filed their answers to the petition on the merits, issues of fact were created, and the matter stands for hearing in the trial Court. The Government's present petition therefore comes too late.

The Government says that the order denying the Canneries leave to intervene was a final decree in the suit, and that, as it was a final decree, the Court of

Appeals had no jurisdiction of the Canneries' appeal, by reason of the provisions of Section 2 of the Expediting Act. This conclusion is incorrect. An order or a decree, which finally disposes of a collateral matter in the pending suit, may be final for the purpose of appeal, without being final in the strict technical sense of the term (*Arnold v. United States*, 263 U. S. 427, 434). It is quite certain, we think, that the order denying leave to intervene was not "the final decree" meant by the Expediting Act. The order denying leave to intervene was, however, sufficiently final to sustain the appeal (*Schwartz v. Costello*, 11 App. D. C. 553; *King v. Harrington*, 35 App. D. C. 111; *California Cooperative Canneries v. United States*, 55 App. D. C. 36), but whether it was final or not, that Court had jurisdiction (*Gilbert v. Endowment Association*, 15 App. D. C. 40). We believe that "the final decree," covered by the Expediting Act, is such as is defined in *Arnold v. United States, supra*, as follows: (434)

> "It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete, that is, final not only as to the parties, but as to the whole subject-matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction. *Hohorst v. Packet* Co., 148 U. S. 262, 264; *Collins v. Miller*, 252 U. S. 364, 370; *Oneida Navigation Corporation v. Job*, 262 U. S. 521, 522; and cases therein cited."

If, therefore, the Canneries had taken a direct appeal to this Court, from the order of May 8, 1923, denying it leave to intervene, its appeal, we fancy, would have been dismissed for want of jurisdiction.

Section 1 of the Expediting Act speaks of "the judgment, order, or decree finally disposing of" the case in the trial Court. Section 2 provides that "an appeal from the final decree of the Circuit Court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof * * *." (This was the wording of the Expediting Act at the time of the entry of the order denying intervention. The language has since been slightly changed, probably to clarify the meaning of the statute.) The statute, in the most explicit terms, contemplates only the decree finally disposing of the case in the trial Court. The order of May 8, 1923, denying the Canneries leave to intervene, was certainly not an order or decree finally disposing of the case, and did not at all affect the merits of the suit, but merely disposed of the collateral phase presented by the application for leave to intervene. Undoubtedly, the consent decree of February 27, 1920, was the decree which finally disposed of the case in the trial Court. That decree was passed more than three years prior to the order denying leave to intervene.

In the many anti-trust suits which have been filed by the United States, hundreds upon hundreds of orders and decrees, sufficiently final to support appeals to intermediate appellate courts, have been entered. It is and has been the policy of Congress to relieve this Court as much as possible, by restricting

its appellate jurisdiction, and it is therefore inconceivable that the Expediting Act was intended to give direct appeals as matter of right from every such order or decree. The Expediting Act means exactly what it says, when it expressly confines its scope to the decrees finally disposing of the suits. As said by the three Judges in *Southern Pacific Terminal Company v. Interstate Commerce Commission,* 166 Fed. 134, 135-136, the Expediting Act, fairly construed, permits the case to proceed in the usual way (except it is to be given precedence and expedited) until final hearing, when it is to be set down before three Circuit Judges, and after the final decree, it may be carried within sixty days by appeal to the Supreme Court by either party, and that "to apply it to all proceedings in the case is, in the nature of things, to defeat the very object of the Act, and change it from an expediting act into a hindering and delaying act." In *Continental Insurance Company v. United States,* 259 U. S. 156 (cited by the Government on page 11 of its brief in support of its petition), this Court uses the following language: "In one of the phases of a case reported as *United States v. Lake Shore & M. S. Ry. Co.,* 203 Fed. 295, the Court of Appeals of the Sixth Circuit was obliged to consider, on an intervening petition, the question of the power of the Court under the Sherman Act to deal with a mortgage * * *."

This Court then quotes approvingly from a certified copy of the memorandum opinion of the Court below. (In the Court of Appeals of the District of Columbia, the Government asserted that the mem-

orandum opinion was not that of the Circuit Court of Appeals for the Sixth Circuit, but was the opinion of the trial Court. However that may be, this Court would not have used the foregoing language unless it was of opinion that a Circuit Court of Appeals, or the Court of Appeals of the District of Columbia, has jurisdiction to consider, on an intervening petition, such an exceedingly important question as was involved in that case.) If this is true, it is quite certain that the Court of Appeals of the District of Columbia had jurisdiction to entertain the appeal from the order denying the Canneries leave to intervene. Moreover, in its opinion in *Swift & Company v. United States*, decided March 19, 1928, but not yet officially reported, this Court says that "three intervening petitions were filed—that of the Southern Wholesale Grocers Association, allowed September 10, 1921; that of the National Wholesale Grocers Association, allowed November 5, 1921; and that of the California Cooperative Canneries, allowed September 13, 1924, see 289 Fed. 908." The order of September 13, 1924, was entered after the mandate of the Court of Appeals went down, and 289 Fed. 908 is a reference to the opinion of the Court of Appeals reversing the order of May 8, 1923, denying the Canneries leave to intervene. From the language just quoted, it is apparent that this Court was of opinion that the Court of Appeals had jurisdiction over the appeal from the order denying leave to intervene—at least, that was assumed to be so.

The Government cites no case in which an unsuccessful applicant for leave to intervene took a direct

appeal to this Court under the Expediting Act, and we have not been able to find any such case in which this Court sustained the right to maintain such a direct appeal. Owing to the vast and complicated interests involved in anti-trust suits, and the many parties concerned therein, applications for leave to intervene are very numerous. Many have been granted and some have been denied. If a direct appeal lies as of right to this Court from an order granting or denying leave to intervene, it is strange that we can find no case in the books in which this Court sustained the right to take and maintain such an appeal. However, apart from the power to entertain applications for leave to intervene, Section 5 of the Anti-Trust Act authorizes the Court to bring in additional parties if the ends of justice so require.

The Expediting Act itself affords a conclusive answer to the Government's application for certiorari without considering the decision showing the nature of the final decrees which have been reviewed on direct appeals under the Expediting Act. The question of statutory construction can best be adduced by reference to the provisions of the Expediting Act itself (*Rudolph v. Potomac Electric Power Company*, 24 Fed. (2d) 882).

The Expediting Act applies only to final decrees on the merits of the whole case, and to such final supplemental or subsequent decrees that directly affect the merits of the original final decrees. The statute contemplates only final decrees on the merits in the strict technical sense of the term. An order granting or denying leave to intervene decides noth-

ing either on the merits of the case or on the merits of the petition for intervention, but merely shuts or opens the door of the Court to a hearing on the merits as set up in the intervening petition. Until allowed to intervene, the applicant is a mere stranger to the suit, and for this reason it could not have taken a direct appeal to this Court from the order denying intervention, and such an appeal, if taken, would have been dismissed for want of jurisdiction. There could not be any final decree on the merits of the intervening petition, unless and until the Canneries was allowed to intervene, and until such a final decree on the merits was entered, it could not be determined whether it was within or without the Expediting Act. Only parties to anti-trust suits, and not strangers, can take direct appeals to this Court under the Expediting Act. Until a stranger secures a standing, he cannot be heard on the question of jurisdiction or any other matter (see *Keatley v. Furey*, 226 U. S. 399, 403).

Recurring to the case of *Continental Insurance Company v. United States*, 259 U. S. 156: That was a suit instituted by the Government under the anti-trust acts. In the District Court, certain minority stockholders were permitted to intervene. The final decree entered in that case adjudicated the rights of the interveners, and it was not appealed by the Government or by the defendants, but was appealed by the interveners. The final decree which was entered in the District Court, and from which the interveners prosecuted their appeal, was entered upon a prior mandate of this Court. Upon the appeal thus prose-

cuted by the interveners, and which, we repeat, involved the merits of the final decree in an anti-trust suit, this Court, in the case cited, reviewed the decree. It is obvious that the case would be in point if the Supreme Court of the District of Columbia, after hearing the merits of the intervening petition of the Canneries, should enter a final order or decree vacating or materially modifying the consent decree of February 27, 1920, which finally disposed of the whole case in that Court. Whether a direct appeal to this Court would lie from such an order or decree in such an event, is not the question, because that is not this case in its present posture. It is to be noted that in *Continental Insurance Company v. United States*, no appeal was taken from the order of the District Court allowing the intervention.

The recent decision of this Court on the Packers' appeal from the order denying their motions to vacate the final consent decree of February 27, 1920, even if applicable to the pending petition, would not be determinative of it, since those appeals concern the Packers and the Government, but not the Canneries (see *District of Columbia v. Brewer*, 32 App. D. C. 388; *Scotten v. Littlefield*, 235 U. S. 407).

The order of September 13, 1924, allowing the Canneries to intervene, was the order of the trial Court, and not of the Court of Appeals. That order was final for the purpose of appeal (see *Schwartz v. Costello*, 11 App. D. C. 553; *King v. Harrington*, 35 App. D. C. 111), but no appeal from it was taken by the Government or the Grocers or the Packers either to this Court or to the Court of Appeals, and the

time for such appeal has long since passed. If the Government be right in its present contention concerning the lack of jurisdiction of the Court of Appeals to entertain the appeal of the Canneries, because the order denying intervention was within the Expediting Act, then it must follow that the Government had a right of direct appeal to this Court from the order allowing intervention. That order is still in full force and effect, and cannot now be vacated. The Court of Appeals, in *Gilbert v. Endowment Association*, 15 App. D. C. 40, entertained an appeal from a decree of the Supreme Court of the District of Columbia that was thought to be final. Subsequently, however, this Court held that the decree was not final (*Gilbert v. Washington Beneficial Endowment Association*, 173 U. S. 701) and when the mandate of this Court was received by the Court of Appeals, a motion was made to vacate its decree, to which the Court replied (page 42) that "it is not apparent that it would serve any good purpose to vacate the decree of this Court." Of course, if the decree of the Court of Appeals, now assailed by the Government, be not void for want of jurisdiction, it cannot now be vacated any more than the order for intervention can be set aside, because of the expirations of the terms during which they were entered.

Undoubtedly, the trial Court had jurisdiction to entertain the Canneries' petition for leave to intervene, and to grant or deny it. That Court first denied such leave, and then granted it. Even if the decision and mandate of the Court of Appeals be void for want of jurisdiction, and therefore merely de-

claratory and not obligatory, but the trial Court yielded to the persuasiveness of the reasoning in the opinion of the Court of Appeals, in passing the order granting the Canneries leave to intervene, the validity of that order would not be affected. Both the Court of Appeals and the trial Court get their jurisdiction and power from the organic statutes creating them, and neither can add to nor take from the jurisdiction or power of the other. A wrong reason for a right order allowing intervention does not make such order either void or voidable, if otherwise within the jurisdiction of the court.

In *Swift v. United States, supra*, neither the order allowing intervention nor the suspending order was before this Court, or considered in the opinion, although the order allowing intervention was mentioned in stating the case. No appeal was taken from the intervention order, as we have stated. Special appeals from the suspending order were prayed by the Government and by the Grocers, but were denied, and thereupon they took general appeals therefrom, which were dismissed on motion of the Canneries. No appeals in this case are pending in this Court or in the Court of Appeals, and the time limits therefore have long since expired.

No proceedings to expedite this case were ever taken in the trial court, under the provisions of Section 1 of the Expediting Act, but the first time the Government invoked the statute was on its motion in the Court of Appeals, to dismiss for want of jurisdiction the Packers' appeal from the order of the trial Court overruling their motion to vacate the

consent decree, which finally disposed of the case in the latter Court. Until the filing of the Government's motion in the Court of Appeals, no objection to the jurisdiction of the Court of Appeals to entertain the Canneries' appeal was made by the Government or the Grocers or the Packers. No one thought that the Court of Appeals was without jurisdiction. When the Government and the Grocers came to appeal from the suspending order, they took their appeals to the Court of Appeals and not to this Court. Undoubtedly they were of opinion that the order denying intervention and the suspending order were not within the Expediting Act, and that appeals therefrom would lie only to the Court of Appeals. The motion to vacate in the Court of Appeals was an afterthought, suggested but not supported by the decision of this Court on the Packers' appeal.

If the order for intervention and the suspending order are final, the Court below cannot vacate them, whether the Court of Appeals was right or wrong in overruling the Government's motion. If the decree of the Court of Appeals be void for want of jurisdiction, the Government is under no obligation to take any direct steps for its cancellation (*Tenney v. Taylor*, 1 App. D. C. 223, 227; *Harper v. Cunningham*, 8 App. D. C. 430, 438), and the Court of Appeals is not required to vacate it.

We think, however, that the decree of the Court of Appeals is not void. It was entered in a case clearly within the jurisdiction of that Court, and on an appeal which did not fall within the Expediting Act, and could not have been taken to this Court.

In *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission*, 215 U. S. 216, this Court held that the provisions of the Expediting Act do not authorize the trial Court to send up the whole case to this Court, and further held that this Court will not consider a case "in which no final judgment or decree or order determinative of the merits was rendered." Certainly, the order of the Supreme Court of the District of Columbia, denying the Canneries leave to intervene, was not only not determinative of the merits of the case of the Government against the Packers, but in no way affected the final decree of February 27, 1920, theretofore entered in the case, and determinative of its merits. The case last cited is therefore in point, and compels a denial of the pending petition for certiorari. A different situation may be presented when and if there is any further order of the trial Court determinative of the merits of the main case, or affecting, by material modification or by vacating in whole or in some substantial part, the final decree on the merits.

In its brief (page 12) the Government says that the order of the trial Court of May 8, 1923, denying the Canneries' application to intervene, was final, and then says that a court has no power to alter or set aside its final judgments or decrees after the expiration of the term at which they were entered, except for jurisdictional invalidity and certain formal defects not here involved. To this familiar rule, the principal exception is not stated, which is that such power continues if appropriate proceedings have been taken during the term. The Canneries' appeal

was taken and perfected during the term. If the trial Court's power ceased at the end of the term, then it never could be restored by the Court of Appeals, because that which has perished cannot be revived. The power of the trial Court was not destroyed, but was merely suspended. In addition, the power of the trial Court was preserved by the eighteenth section of the consent decree (record 129), providing as follows:

> "Eighteenth. That jurisdiction of this cause be, and is hereby retained by this Court for the purpose of taking such other action or adding at the foot of this decree such other relief, if any, as may become necessary or appropriate for the carrying out and enforcement of this decree and for the purpose of entertaining at any time hereafter any application which the parties may make with respect to this decree."

The Canneries is one of the "parties" within the meaning of that word as used in the decree, by reason of the fact that it has been admitted to the suit as a party, and not as a mere *amicus curiae* to make suggestions. The reservation of jurisdiction of the cause is in all-embracing terms—"for the purpose of entertaining at any time hereafter any application which the parties may make with respect to this decree." (See *United States v. Corbett*, 215 U. S. 233, 241.)

The retention of jurisdiction for the purpose of entertaining "at any time hereafter any application" which the parties may make with respect to

the decree, would seem to have been used in the broadest sense for the express purpose of excluding the possibility of the contention now made by the Government, namely, that the jurisdiction and power of the trial Court to allow the Canneries to intervene, and to suspend temporarily the operation of the decree, ceased at the close of the term at which each was passed. The retaining clause of the decree is directed to two separate and distinct purposes,—(1) for the purpose of taking such other action, or adding such other relief, if any, as may become necessary or appropriate for the carrying out and enforcement of the decree, and, (2) for the purpose of entertaining at any time thereafter any application which the parties might make with respect to the decree. The first purpose is purely administrative, while the second contemplates vacating, modifying, or suspending the decree itself. The decree clearly indicates that it was at least expected, if not intended, that it might become necessary to vacate, modify, or suspend it, and for this reason the second purpose was included. The whole case, and every order and decree, were so completely retained within the jurisdiction of the Court, that we do not think that it can reasonably be said that the order denying intervention was excluded. In *United States v. Lake Shore & M. S. Ry. Co.*, 5 Fed. (2d) 240, an anti-trust suit, the final decree contained a retention of jurisdiction, and the Court held it to continue until the combination was completely dissolved. The Court said (241):

> "* * * Jurisdiction of the cause was expressly retained by the decree for the purpose of making such other and further orders and decrees as might be necessary to the due execution of the decree of 1914, and the complete dissolution of the combination condemned thereby.
>
> "* * * Under that retention, orders have been made from time to time, as deemed necessary, to effectuate dissolution."

We therefore respectfully submit, (1) that the Supreme Court of the District of Columbia retained jurisdiction over the order of May 8, 1923, denying the Canneries' application for leave to intervene; (2) that the Court of Appeals of the District of Columbia had jurisdiction of the Canneries' appeal from the order of May 8, 1923; (3) that the trial Court had power to enter the suspending order; (4) that the Court of Appeals was right in denying the Government's motion to vacate; and (5) that the Government's present petition for the writ of certiorari should be denied.

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California Cooperative Canneries.

Washington, D. C.,
August 27, 1928.